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STATE LEGISLATION IN AID OF VICTIMS AND WITNESSES OF CRIME

Modern criminal law reform, attempting to protect defendants' rights, has too often neglected the needs and rights of crime victims.¹ The problems faced by victims of crime include: encountering the defendant, the defendant's friends and family, and the community; obtaining medical, financial, or psychological services when needed; and understanding the administration of criminal justice. Each dimension involves distinctive relationships and difficulties which vary with emotional tensions, the type of contact the victim has with others, the attitudes of professionals encountered, and the complexity of the legal procedures. Each, therefore, presents unique obstacles to solving the problems of the oft-forgotten victim.

The criminal law reform movement of the last twenty years has given rise to an increased awareness of the victims of crime.² Pressure to better protect and assist crime victims has come not only from lawmakers³ and those involved in criminal administration,⁴ but also from psychologists, sociologists, and social service agencies.⁵ Those seeking to ease the burdens of victimization recognize that a successful

1. "Defendant" is used here for consistency and ease in reference. The problems this note discusses may develop long before adversarial positions solidify or a case goes to trial. Similarly, "victim" will often be used to describe witnesses as well as victims of crime.

In 1976, the ABA Criminal Justice Section created the Committee on Victims, largely out of the recognition that the organized bar had focused attention on rights of the accused for years, to the neglect of crime victims. ABA, CRIMINAL JUSTICE SECTION, VICTIMS COMM., REDUCING VICTIM/WITNESS INTIMIDATION: A PACKAGE 3 (1981) [hereinafter cited as REDUCING INTIMIDATION]. For an excellent article on the problems witnesses face, see Ash, *On Witnesses: A Radical Critique of Criminal Court Procedures*, 48 NOTRE DAME LAW. 386 (1972).

2. REDUCING INTIMIDATION, *supra* note 1, at 3.
3. State legislative action is discussed below. See also ABA, CRIMINAL JUSTICE SECTION, VICTIM/WITNESS LEGISLATION: CONSIDERATIONS FOR POLICY MAKERS (1981). In proclaiming the week of April 19, 1982, as *Crime Victim's Week*, President Reagan urged all citizens and federal, state, and local officials "to devote special attention to the needs of victims of crime." Proclamation No. 4929, 47 Fed. Reg. 16,313 (1982). The American Bar Association, Committee on Victims, held 2 days of hearings in 1979, with testimony from prosecutors and defense attorneys, police officers, judges, legislators, psychologists and counselors, social service workers, and individuals who had been the victim of a crime. ABA, VICTIMS CRIMINAL JUSTICE SECTION, COMM. PROCEEDINGS (June 4 & 5, 1979) [hereinafter cited as ABA PROCEEDINGS]. The resulting model statute has been the basis of state legislation and of the Federal Victim and Witness Protection Act. S. REP. NO. 532, 97TH CONG., 2D SESS. 15, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2515.
4. See, e.g., NAT'L DIST. ATT'Y ASS'N, COMMISSION ON VICTIM WITNESS ASSISTANCE, HELP FOR VICTIMS AND WITNESSES (Final Report, 1976) [hereinafter cited as NDAA REPORT], which details programs in eight District Attorneys' offices across the country, their purposes, methods, and results.
5. See, e.g., the studies reported in CRIMINAL JUSTICE AND THE VICTIM (W. McDonald ed. 1976); the report of a project to set up a Crime Victims Service Center in New York, in R. REIFF, THE INVISIBLE VICTIM (1979); and L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS (1974).

effort must involve all the people a victim will encounter at each stage of the criminal justice system.

Despite these concerns, only five states have adopted comprehensive legislation which protects the rights of crime victims and witnesses.⁶ This note will analyze attempts by states to better accommodate the needs of crime victims and witnesses,⁷ and provides a model statute to assist states in enacting more complete and integrated legislation.⁸

LACK OF INFORMATION ABOUT THE CRIMINAL JUSTICE SYSTEM

Many of the problems victims and witnesses have with the criminal justice system stem from a lack of accurate information about its operation.⁹ Victims commonly do not understand their role in the system, and often have unrealistic expectations about results.¹⁰ Citizens often do not realize how long and involved the criminal justice process can be, or how long emotional recovery may take until they become the victims. News coverage and television dramas which create the impression that crimes are solved quickly and that justice is administered efficiently give an overly-idealized image of the legal profession and the trial process.¹¹

In our modern criminal justice system, the prosecutor represents society and not the victim, under the theory that crime, as opposed to

6. WIS. STAT. ANN. § 950 (West 1955, rev. ed. 1981), enacted 1979; 18 PA. CONS. STAT. ANN. § 4951-56 (Purdon Supp. 1981), enacted 1980; NEB. REV. STAT. § 81-1843 to 1848 (1943, rev. ed. 1981), enacted 1981; OKLA. STAT. ANN. tit. 19, § 215.33 (West Supp. 1982), enacted 1981; WASH. REV. CODE ANN. § 7.69 (Supp. 1981), enacted 1981.
7. Because states have enacted a variety of complex and diverse statutes providing compensation or restitution to victims of crime, a discussion of these statutory provisions would be beyond the scope of this note. For a discussion of these topics, see, e.g. Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485 (1980); Note, *Compensating Crime Victims: A Legislative and Program Analysis*, 4 J. LEGIS. 71 (1977); Siegel, *Court Ordered Victim-Restitution: An Overview of Theory and Action*, 5 NEW. ENG. J. PRISON LAW 135 (1979). For representative statutes, see IND. CODE ANN. §§ 16-7-3.6-1 et seq. & 35-7-2-1 (West Supp. 1982); Wis. Stat. Ann. §§ 949.01 et seq. & 973.09 (West Supp. 1982).
8. There has been, however, no detailed treatment of existing legislation to which the reader may refer. Limited analyses as part of a broader discussion include the ABA Committee on Victims Hearings, *supra* note 3, S. REP. No. 532, on the Victim and Witness Protection Act of 1982. The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) and was enacted October 1, 1982, "to strengthen existing legal protections for victims and witnesses of Federal crimes and require the United States Attorney General to develop additional legislative proposals and guidelines toward this end." S. REP. No. 532, *supra* note 3, at 9. Its drafters recognized "that the majority of serious violent crimes fall within the jurisdiction of the State and local law enforcement agencies. An important purpose . . . therefore, is to provide a model statute for State and local governments." *Id.*, at 10. The scope and nature of victims' problems differ on the state level from that of the federal level, because of differences in the impact on individuals, the community, and the local criminal justice system. Local needs will differ accordingly.
9. ABA, SECTION OF CRIMINAL JUSTICE, VICTIM WITNESS ASSISTANCE PROJECT, VICTIM/WITNESS LEGISLATION: CONSIDERATIONS FOR POLICYMAKERS 28 (1981) [hereinafter cited as VICTIM/WITNESS LEGISLATION].
10. *Id.* See also *Expectations and Realities* in M. BARD & D. SANGREY, THE CRIME VICTIM'S BOOK 4-8 (1979); ABA PROCEEDINGS, *supra* note 3, at 14.
11. M. BARD & D. SANGREY, *supra* note 10, at 7-8.

civil wrongs, offend the peace and security of the people as a whole, and not just that of the individual. By protecting the rights of society rather than the victims' rights, professionals working in the system, and by their attitudes and behavior, may neglect and inadvertently isolate the victim. The victim often fails to receive basic information about criminal investigations and court procedures. Thus, the person with first-hand knowledge about the crime in question, who is vitally important to the resolution of the case, remains an outsider to the process.

Until they become victims, most people have no experience with the criminal justice system.¹² Most people, therefore, do not understand the individual responsibilities of nor the working relationships between the police, prosecutor, defense counsel, judge, and jury. Decisions to reduce a charge, negotiate a plea or sentence, or release a defendant on bail can be particularly confusing or upsetting.¹³ This lack of understanding and the sense of personal violation the victim feels¹⁴ combine to produce a profound sense of frustration and result in reduced cooperation and effectiveness as a witness. Victims and witnesses who have had solid communication with the prosecutor, and who do not remain outside the case, are more likely to follow through with the court process, to be effective witnesses, and to feel more satisfied with the experience.¹⁵

Victims are often reluctant to call the police station or prosecutor's office to inquire into the status of a case.¹⁶ Victims fear an "administrative runaround," being told the person who has the requested information is out, or receiving a fictitious response to a question instead of a truthful answer.¹⁷ The actual frequency of these incidents is less important than the victim's anticipation of their occurrence. This anticipation can have as harmful an effect as an actual incident on both the victim's personal recovery from the crime, and his or her cooperation and effectiveness as a witness.

It is crucial, therefore, that the police and prosecutor stress their availability to explain procedures and give progress reports.¹⁸ Victims and witnesses need to feel the professional's concern. Without solid

12. According to a survey conducted by the New Orleans District Attorney's Office, 80% of the victims and witnesses interviewed had no prior experience as either crime victims or witnesses. NDAA REPORT, *supra* note 4, at 60.

13. VICTIM/WITNESS LEGISLATION, *supra* note 9, at 28.

14. See M. BARD & D. SANGREY, *supra* note 10, at 10-29, for a discussion of the concept of violation.

15. "[I]t seems that the difference in the kind of involvement that the victim has in the administration of justice affects the relationship between 'administrative runaround' . . . and victim dissatisfaction. The more involved the victim gets in assisting in the administration of justice the less likely he is to be dissatisfied. . . ." Knudten, *The Victim in the Administration of Justice: Problems and Perceptions*, in W. McDONALD, *supra* note 5, at 119.

16. See Carrington & Younger, *Victims of Crime Deserve More Than Pity*, 8 HUM. RTS. 10, 14 (1979). Judge Eric Younger of the California Superior Court chairs the ABA Victims Committee.

17. See *supra* note 15.

18. In several of the programs sponsored by the NDAA, witnesses were given pamphlets or handbooks to answer frequent questions, explain general procedures, and provide other in-

evidence of that concern, it will be all too easy for a victim or witness to succumb to pressures and drop out of the criminal justice process.¹⁹ Various state legislation has addressed this need for information in several areas.

Bail

The frequently misunderstood concept of bail merits special explanation from a police officer or prosecutor, before or at the time a suspect is taken into custody, or at the time of release. Victims may not realize that release on bail does not mean their information about the crime is disbelieved, or that the case will not be prosecuted.²⁰ In addition, victims may be unaware that the defendant's release can be revoked upon violation of certain conditions. Such conditions must be explained to the victim just as they are to the defendant.²¹ For example, Indiana provides for revocation of bail on clear and convincing proof of threats or intimidation of prospective witnesses in connection with a pending criminal proceeding.²² Judges may order the defendant to keep a certain distance from a particular witness.²³ Notice to the witness, however, of the conditions set or the possibility of revocation is not required in Indiana or in any other state.

Plea Negotiations

Plea negotiations, another commonly misunderstood concept, has drawn much criticism lately. Those who oppose lenient sentencing may consider negotiation an affront to the goals of criminal justice.²⁴ In comparison with a victim's suffering, a defendant's punishment frequently appears to be absurdly light.²⁵ Concerned with this seeming incongruity, several states in recent years have considered legislation allowing for victim participation in plea negotiations.²⁶ Most of these proposals pertain to the use of victim impact statements during

formation, such as directions to the courthouse and parking, to the courtroom, about child care and transportation facilities. NDAA REPORT, *supra* note 4, at 25, 31, 44 & 47.

19. ABA PROCEEDINGS, *supra* note 3, at 18, 54.

20. Carrington & Younger, *supra* note 16, at 14. See also the discussion in Portman, "To Detain or Not To Detain?"—A Review of the Background, Current Proposals, and Debate of Preventive Detention, 10 SANTA CLARA L. REV. 224 (1970).

21. Victims in Milwaukee are notified of the defendant's release on bail, as a practice of the local Project Turnaround. ABA PROCEEDINGS, *supra* note 3, at 5. The need to explain to defendants the conditions of their pretrial release is discussed, *id.*, at 13, 53 & 57. In St. Louis, defendants are given notice on a printed card; in other jurisdictions, by a statement on the indictment. *Id.*, 71-72.

It has been suggested that in some cases, setting bail conditions is insufficient and that, therefore, the protection of victims and witnesses before trial should be a legal basis for increasing bail. Carrington & Younger, *supra* note 16, at 15.

22. IND. CODE ANN. § 35-33-8-5 (West Supp. 1982).

23. IND. CODE ANN. § 35-33-8-3 (West Supp. 1982).

24. ABA PROCEEDINGS, *supra* note 3, at 39, 41.

25. *Id.*

26. A much-publicized effort has been California's Proposition 8, passed by voters in 1982. See Victim Rights Bill Fuels Get-Tough Stand, 68 A.B.A.J. 530 (1982); 13 CRIM. JUST. NEWSL. 3 (June 21, 1982).

sentencing.²⁷

Indiana adopted legislation in 1978 which requires a prosecutor making a recommendation on a felony charge to inform the victim that discussions are being conducted, to relay the contents of any recommendation before it is filed, and to notify the victim when the court will consider the recommendation so that the victim may be present.²⁸ Only after the prosecutor has complied with these provisions will the court consider a recommendation on a felony charge.²⁹ In Indiana, the prosecutor is also required to offer to show the proposed recommendation to any victims of the felony and give them the opportunity to present their opinion of the recommendation in a written statement.³⁰

Provisions like this benefit the victim and improve the court's ability to hand down a sentence in line with the totality of circumstances. The victim's view of the case and statement of its impact will often include important factors not relevant to guilt or innocence and thus not introduced at trial, nor otherwise available to the judge or jury.³¹

Court Scheduling

Notifying witnesses when court schedules change can reduce the witness's anxiety, minimize the inconvenience of unnecessary trips and wasted time,³² and is a matter of courtesy.³³ The experience of several communities has shown that a specially designed unit within the prosecutor's office can notify witnesses of schedule changes and court dates without impeding the performance of other prosecutorial duties.³⁴ Notification of schedule changes is even more important in serious offenses and as the case progresses. According to a study of victims in Milwaukee,³⁵ unnecessary trips and wasted time were a greater problem at later stages in the criminal process (preliminary hearings and trials)³⁶ and for more serious offenses³⁷ than at earlier stages and for

27. VICTIM/WITNESS LEGISLATION, *supra* note 9, at 46.

28. IND. CODE ANN. § 35-35-3-2 (West Supp. 1982).

29. *Id.*

30. *Id.* § 35-35-3-5. The statute specifically states that no additional rights are given to the defendant, and that "failure to comply gives no grounds for post conviction relief." Other provisions extend the rights of notice and opportunity to give an opinion to a victim's next of kin, provide for cases of special victims, such as minors or business entities, and require that in case of multiple victims only the three believed to have suffered most need be contacted. *Id.* §§ 35-35-3-6 & 7.

31. VICTIM/WITNESS LEGISLATION, *supra* note 9, at 46. Under FLA. STAT. ANN. § 921.143 (West Supp. 1981), a victim may make an oral statement at a sentencing hearing following a guilty plea.

32. These were the two most frequent complaints in a study of victims in Milwaukee. Knudten, *supra* note 15, 121-23.

33. VICTIM/WITNESS LEGISLATION, *supra* note 9, at 29.

34. The National District Attorneys Association project involved 8 cities or counties where a Victim Witness Assistance Units was set up in the District Attorney's office. Marked improvements resulted, both in the victims' and witnesses' individual experiences, and in the overall administration of criminal justice. See NDAA REPORT, *supra* note 4.

35. Knudten, *supra* note 15, 115.

36. *Id.* at 131, 136.

37. *Id.* at 139.

lesser offenses.

Final Disposition

Notifying victims and witnesses regarding a case's final disposition is essential to their fair treatment.³⁸ Victims and witnesses play a vital role in the administration of our criminal justice system and, therefore, have a right to know the results of their involvement. The court process often continues after the victim's direct involvement has ended, with sentencing hearings, psychiatric evaluations, probation reports, and so on, making it difficult for the victim to know whom to contact to learn the outcome of the case. For this reason, the prosecutor should inform the victim and explain the final disposition of the post-trial processes as soon as possible.³⁹

INTIMIDATION AND RETALIATION

Perhaps the most paralyzing problem a victim faces, and certainly the most prominent, is intimidation.⁴⁰ Intimidation presents a problem for all victims and witnesses, including those who choose not to report the crime or testify, and can occur at any stage of the criminal process. According to the Victims Committee of the ABA, "[i]ntimidation . . . is a persistent problem with two unique aspects: It is the one crime in which only unsuccessful attempts are ever reported or discovered. It is also a crime which inherently thwarts the processes of the justice system itself."⁴¹

"Intimidation" encompasses the fear of and the actual use of verbal or physical influence to obstruct justice. It can take the form of attempts to prevent the report of crime, to alter testimony to be given, or to withhold information.⁴² Intimidation, through personal injuries or property damage, instills fear and thus influences victim involvement in the justice process.

Intimidation takes three basic forms.⁴³ First is the "traditional threat" which includes face to face confrontations, and acts of violence or vandalism, such as anonymous telephone calls and rocks through windows.⁴⁴ The purpose of such a threat may be to influence future participation in the justice process, or to retaliate for past participa-

38. *Id.* at 28-29.

39. CAL. PENAL CODE § 1116.10 (West 1981) requires the prosecutor, on the victim's request, to inform the victim by letter within 60 days of the final disposition of the case at the trial level.

If the final disposition involves the defendant's release, notice should be earlier. Among the most important and most frequently utilized functions of the NDAA programs, *see* NDAA REPORT, *supra* note 4, was notice and explanation of case dispositions. The Unit Statistics are given at the end of each program summary.

40. ABA PROCEEDINGS, *supra* note 3, *passim*, in particular at 6, 11-12, 52-54.

41. REDUCING INTIMIDATION, *supra* note 1, at 1.

42. *See* the discussion, *infra* at 9-10, and statutes cited.

43. ABA Hearings, *supra* note 3, at 63.

44. *Id.* at 9, 63; Carrington & Younger, *supra* note 16, at 15, 46.

tion.⁴⁵ Second is "community intimidation" which consists of the subtle pressure of community attitudes toward police and crime, shaped by personal beliefs and past experiences. Third is "perceived or anticipated intimidation" which includes the attitude and information problems the victim has with the criminal justice system itself.

"Perceived or anticipated" intimidation may be the easiest to reach, through an approach combining legislation and policy to improve local institutional practices. "Community intimidation," on the other hand, may be the hardest to reach, because it is based on deep-seated community attitudes which change only over time. "Traditional" intimidation, "the most visible and dangerous type,"⁴⁶ has been addressed in some degree by nearly all state legislatures.⁴⁷

Direct threats and acts of violence such as assaults, batteries, and trespasses are acts punishable in themselves, outside the context of intimidation or retaliation.⁴⁸ Such acts can only be prosecuted, however, if reported, and it is generally only the unsuccessful act which will ever come to the attention of law enforcement officers.⁴⁹ It is necessary, then, that legislation be enacted which covers those acts done purposely to affect the interaction of a victim or witness with the justice system. State statutes which deal with this issue distinguish between "tampering" and "intimidation."

Tampering, the lesser offense, typically requires that a person act with intent to induce a witness to withhold testimony, testify falsely, or be absent from an official proceeding.⁵⁰ Intimidation, as a specific prohibition rather than as a general term, typically requires the use of force or threats with intent to influence testimony, or induce a witness to avoid legal process or be absent from an official proceeding.⁵¹ The intent standard is common to both provisions in most schemes.⁵² In-

45. *Id.* at 35, 63. See also the discussion of retaliation in S. REP. NO. 532, *supra* note 3, 20-22, 24.

46. *Id.* at 52.

47. See the statutory survey in NDAA REPORT, *supra* note 4, at 70-75.

48. "Retaliation" refers to acts done after the victim or witness has already reported or testified, in effect to "punish" the person for cooperating with the legal authorities.

49. See *supra* text accompanying note 41.

50. See, e.g., HAWAII REV. STAT. § 710-1072 (1968). The Commentary on this section explains that "tampering" is graded a misdemeanor while "intimidating", *id.* § 710-1071, is a felony because, while the "social harm" is the same as for intimidating and for bribery, *id.* § 710-1070, "the means (i.e., conduct intended to induce) . . . are not as culpable."

51. See, e.g., *id.* § 710-1071. The Commentary describes the potential for harm as "the undermining of the integrity of an extremely important part of the judicial process," and explains that while such conduct might fall within the criminal coercion section, it is separated out and given a heavier sanction because it "carries the additional harm of interfering with an official proceeding."

52. At least two states require willful conduct: MASS. GEN. LAWS ANN. ch. 268, § 133 (1931); NEV. REV. STAT. § 199.230 (1979). Several states require purposeful or knowing conduct: MONT. CODE ANN. § 45-7-206 (1981); OHIO REV. CODE ANN. § 2921.03 (Page 1953, rev. ed. 1982); ARIZ. REV. STAT. ANN. § 13-2802, 2804 (1956). "Intent" can be defined as the conscious objective or desire to produce the particular result, while "knowledge" may be defined as awareness or belief that a particular result is substantially certain. Knowledge, then, is a slightly lower state of mind than intent, and presumably easier to establish. Considering the purpose of this type of legislation, knowledge would be the preferred standard as a matter both of structure and of application. See, e.g., 18 PA. CONS. STAT. ANN. § 4952 (Supp. 1981),

intimidation provisions seek to prohibit a wider span of effects than do tampering provisions in an effort to make available as much protection as possible when force or threats are used.

Certain state legislatures have specifically included within their statutory scheme punishment for retaliatory conduct against a victim who participates or cooperates with criminal justice personnel.⁵³ Although "tampering" and "intimidation" statutes would seem to include such conduct, it is possible that their definitions may be too narrow to include conduct motivated by retaliation. Retaliation generally occurs *after* participation and thus its effect in obstructing justice is principally in the fear of its use rather than its actual occurrence.

Retaliation occurs after victim participation in the criminal justice process and at a highly vulnerable point in the victim's struggle to regain a sense of personal security. Retaliation is more likely than other acts also to result in serious physical harm or property damage.⁵⁴ It is especially important, therefore, that any statutory restrictions cover a wide range of conduct for which a retaliatory purpose can be established.

It is critical that each state's statutory scheme deal thoroughly with the problem of victim and witness intimidation, including retaliatory conduct. Legislation must adequately specify the purposes and types of conduct prohibited, so that police and prosecutors have an adequate tool with which to fight intimidation and retaliation. Only then will such conduct decrease. Because our system of criminal justice depends on the willingness of victims and witnesses to participate, it is vitally important that they not be afraid to report and testify fully as to the crimes committed. In addition, a detailed, statutory method of penalizing incidents of intimidation or retaliation is essential to the individual victims and witnesses as well as to the community, so that a solid sense of safety and well-being may be maintained.⁵⁵

which defines intimidation broadly as acting in several specified ways "with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice."

53. See, e.g., HAWAII REV. STAT. § 710-1072.2 (Supp. 1981), which penalizes the use of force or threats against a witness or another person and the damaging of a witness' or other person's property in retaliation. The Commentary explains that prior law dealt with persons "about to be called" as witnesses, but that no protection was specifically provided for those who had already served as witnesses. See VT. STAT. ANN. tit. 13, § 3015 (Supp. 1982), which specifies that connection with "a matter already heard, presently being heard or to be heard before any [State] Court" will be protected.

See also ILL. REV. STAT. ch. 38, § 32-4a (Supp. 1981), which makes it a felony to intentionally harass or annoy one who has been a witness in a legal proceeding because of the testimony given. "Harass or annoy" is defined as communicating directly or indirectly "in such manner as to produce mental anguish or emotional distress" or threatening personal harm or property damage to a witness or any of the witness's relatives. Witnesses and threats were added by the 1981 revision.

See also COLO. REV. STAT. § 18-8-604 (1973), prohibiting acts done "as retribution" for testimony actually or expected to be given.

54. See the discussion in S. REP. NO. 532, *supra* note 3, at 21. The Senate Report stresses the importance of protecting family, friends, and associates of the witnesses, as well. *Id.*

55. The legislation discussed does not in any way limit "the inherent power of the court to pro-

VICTIM NEEDS

Among the consequences of victim neglect is lack of awareness of the crime's effect on the victims. Judges particularly are isolated from this information,⁵⁶ which is essential to an understanding of the case as a whole. In addition, victims themselves often need to express their own feelings about the crime as part of the personal psychological recovery process.⁵⁷ The needs of victims may only come to the attention of those who can fill individual needs and solve the problems faced by victims as a group if those needs are publicized and directly confronted.

Victim Impact Statements

Laws providing for the inclusion of a victim impact statement in the prosecutor's presentence report or the probation officer's report have benefits similar to the reports used in plea negotiations.⁵⁸ A minority of states presently require or make optional the inclusion of a victim impact statement in presentence or probation reports.⁵⁹ Under an Ohio statute, the statement must, in addition to detailing any economic losses or physical injuries resulting from the offense, "identify any change in the victim's personal welfare or familial relationships as a result of the offense and any psychological impact experienced by the victim or victim's family . . . and contain any other information related to the impact of the offense upon the victim that the court requires."⁶⁰

tect itself from interference." N.C. GEN. STAT. § 14-226 (rev. ed. 1981), commentary. At least one state has made explicit within its statute that the judicial contempt power is not "repealed or nullified" by the statute. TENN. CODE ANN. § 39-5-115 (1955, rev. ed. 1982). The limitations of the criminal contempt power and the need for a stronger tool are discussed in ABA PROCEEDINGS, *supra* note 3, at 28, 53. See also Note, *The Dilemma of the Intimidated Witness in Federal Organized Crime Proceedings: Choosing Among the Fear of Reprisals, The Contempt Powers of the Court, And the Witness Protection Program*, 50 FORDHAM L. REV. 582 (1982).

56. S. REP. NO. 532, *supra* note 3, at 13.

57. M. BARD & D. SANGREY, *supra* note 10, at 114, 140.

58. See *supra* notes 24-31 and accompanying text. See also VICTIM/WITNESS LEGISLATION, *supra* note 9, at 46-47.

59. Mandatory inclusion: N.H. REV. STAT. ANN. § 504:2 (Supp. 1979), probation officer's report; CAL. PENAL CODE § 1203(h) (West 1981), whenever a probation report is required; OHIO REV. CODE ANN. § 2947.051 (Page 1953, rev. ed. 1982), to be included in probation officer's report where physical harm to the victim "was caused, attempted, threatened" or risked, in case involving a felony conviction or guilty plea. IOWA CODE ANN. § 901.3 (Supp. 1981), presentence investigator "shall promptly inquire into . . . the harm to the victim, the victim's immediate family, and the community." Optional inclusion: IND. CODE ANN. § 35-35-5-6 (West Supp. 1982), at victim's option; N.J. REV. STAT. § 2C:44-6 (Supp. 1982), at victim's option; NEV. REV. STAT. § 176.145(3) (1981), at option of court and prosecutor.

60. OHIO REV. CODE ANN. § 2947.051(B) (1953, rev. ed. 1982). Under Subsection C, victim impact statements are confidential and not a matter of public record, although the defendant, defense counsel, and the prosecutor may receive copies to be returned to the court following the imposition of sentence.

The Senate Report on the Victim and Witness Protection Act of 1982, *supra* note 3, stresses that the impact statement must be factual and easily verifiable: "it must be non-inflammatory and non-argumentative. We never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it." S. REP. NO. 532, *supra* note 3, at 11-13. "[T]he victim impact statement will lend balance to the present infor-

The Ohio statute illustrates the areas in which victims are most affected and which need to be brought to the court's attention. The breadth of the statement forces the sentencing court to consider the full impact of the crime and not just the isolated impact on the criminal.

Victim Service Programs

In recent years, two types of victim service programs have emerged. One type of program is the Victim Assistance Unit or victim coordinator within the prosecutor's office or police department.⁶¹ The other type is an agency which is independent of the prosecutor's office.⁶² Whether publicly or privately funded, the purpose and structure of these independent agencies is to aid the victim in obtaining services which the victim may not realize are available. Such services include short-term emergency loans, compensation for crime losses, witness fees, and psychological services.⁶³

These two types of programs are not mutually exclusive.⁶⁴ Assistance Units within prosecutors' offices exist principally to assist victims who appeal to the criminal justice system. They serve to acquaint individuals with the criminal justice process, and to reduce the harm done by "sometimes indifferent and insensitive" criminal justice agencies.⁶⁵ Independent victim service agencies can act as coordinators, informing victims about available services and providing referrals to other service agencies.⁶⁶ Alternatively, they can serve as "one stop" agencies, helping with applications for compensation or witness fees, where available, interceding with employers when victims need time off for court appearances, or counseling the victim on the premises without the delay of referral to other service agencies.⁶⁷ Utilization of already existing services within the community will also be a factor in designing a local victim service program. Several states have provided, by statute, a ba-

mation available to the court and therefore improve the quality of justice administered by the sentencing court." *Id.*, at 14.

It is also noted that interviewing the victim, assessing the impact, and preparing the statement will take the probation officer only about one additional hour. *Id.*, 12.

61. See NDAA REPORT, *supra* note 4. In its victims and witnesses service statute, Oklahoma places responsibility for all services with the district attorney's office. OKLA. STAT. ANN. tit. 19, § 215.33 (Supp. 1982).
62. See the testimony in ABA PROCEEDINGS, *supra* note 3, in particular at 46, 52, and 66-68.
63. ABA PROCEEDINGS, *supra* note 3. Increasing public awareness of these services is a major function of both types of programs.
64. See also *id.* at 12-14, testimony by the Executive Director of the Aid to Victims of Crime Program in St. Louis about the interaction of her agency with the Victim/Witness Intimidation Unit of the St. Louis Police Department and the victim/witness support unit in the Circuit Attorney's office; and the testimony at 18-19 about Milwaukee's Project Turnaround, which involves the District Attorney's office, police department, and private agencies in one of the countries most ambitious and most successful victim/witness service programs.
65. NDAA REPORT, *supra* note 4, at 1.
66. Testimony as to such programs, their functions and effectiveness is given throughout the ABA PROCEEDINGS, *supra* note 3.
67. *Id.*, in particular at 15, 51, and 71.

sic structure or a financial source for such local programs.⁶⁸

EXISTING LEGISLATION

Existing legislation treats the needs of crime victims in a piecemeal fashion that neither adequately meets those needs or secures the rights of victims. Several states have provided statutory solutions for only some of the victim's problems, such as California's notice of final disposition and Ohio's statement of victim impact. Such enactments have been sparse, and in many cases, are too recent to know their full effectiveness. The best approach to resolving the problems of victims and witnesses is a comprehensive statute.⁶⁹

In 1979, Wisconsin became the first state to enact a comprehensive set of statutes designed to protect and assist victims and witnesses of crime.⁷⁰ Wisconsin's chapter entitled "Rights of Victims and Witnesses of Crime," opens with a statement of legislative intent expressing the values and social policies behind the enactment:

In recognition of the civic and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants.⁷¹

This statement demonstrates the legislature's awareness that the vital role victims and witnesses play in law enforcement and prosecution is often threatened both by conditions within the justice system and by outside forces. The rights of victims and witnesses must be "honored and protected" by the criminal justice system not only because such respect is due, but also to ensure the effectiveness of the system.

Nebraska is the only other state to have set forth the intent of its statutes. After detailing the current conditions in the criminal justice system, the Nebraska statute sets forth a brief goal statement:

It is therefore the intent of the Legislature to provide ways of improving the attitudes of victims and witnesses toward the criminal jus-

68. See WIS. STAT. ANN. § 950.06 (West 1955, rev. ed. 1981); NEB. REV. STAT. § 81-1844 (1943 rev. ed. 1981).

69. The problems victims and witnesses face include: encountering the defendant, the defendant's friends and family, and the community; obtaining medical, financial, or psychological services when needed; and understanding the administration of criminal justice.

70. WIS. STAT. ANN. § 950 (West 1955, rev. ed., 1981). In 1981, Nebraska, Oklahoma, and Washington enacted legislation based on the Wisconsin model. See *supra* note 6. Pennsylvania enacted a different comprehensive statutory approach in 1980. See *supra* note 6.

71. WIS. STAT. ANN. § 950.01 (West 1955, rev. ed., 1981).

tice system and to provide for faster and more complete recovery by the victim from the effects of the crime through the establishment of pilot project centers for victim and witness assistance.⁷²

Statements such as this reflect the seriousness with which some state legislatures consider the problem of victims' rights. Such thorough statements of intent and findings are an important guide to implementation of the statutes' policies and programs.

Four of the five states which have attempted a comprehensive statutory resolution of these problems have enumerated victims' and witnesses' rights.⁷³ These are not prerogatives in the sense of a constitutional right; but in the words of the Washington state legislature,⁷⁴ "[t]here shall be a reasonable effort made to assure that victims and witnesses of crimes" have these rights. Enforcement of these rights, however, remains discretionary.⁷⁵ Due to differences in conditions and practices among a state's localities, however, a statewide plan needs such flexibility to be practicable.

States' enumerations of victims' rights, based on the Wisconsin model,⁷⁶ include the right to be informed of the case's final disposition and of the felony defendant's release from custody.⁷⁷ Victims are to be notified of court schedule changes.⁷⁸ They are to receive protection from retaliation, and accurate information as to the level of protection available.⁷⁹ They are to be informed what financial and social services are available, including witness fees and fee application procedures.⁸⁰ Whenever, possible, victims are to be provided with secure waiting areas in courthouses, away from defendants, and away from friends and families of defendants.⁸¹ They have a right to the expeditious return of property when no longer needed as evidence,⁸² and a right to employer

72. NEB. REV. STAT. § 81-1843 (1943, rev. ed. 1981).

73. These states are Wisconsin, Nebraska, Oklahoma, and Washington.

74. WASH. REV. CODE ANN. § 69-030(8) (Supp. 1981). The Federal Victim and Witness Protection Act, *supra* note 4, uses the term "guidelines."

75. In Wisconsin, counties are responsible for the enforcement of victims' rights and provision of services, WIS. STAT. ANN. § 950.06; in Oklahoma, services are provided at the discretion of the district attorney, in cooperation with the judiciary, OKLA. STAT. ANN. tit. 19, § 215.33 (West Supp. 1982). The Nebraska and Washington statutes do not specifically designate responsibility.

76. S. REP. NO. 532, *supra* note 3, at 38.

77. WIS. STAT. ANN. § 950.04(1); NEB. REV. STAT. § 81-1848(1); WASH. REV. CODE ANN. § 7.69.030(1).

78. WIS. STAT. ANN. § 950.04(2); NEB. REV. STAT. § 81-1848(2); WASH. REV. CODE ANN. § 7.69.030(2).

79. WIS. STAT. ANN. § 950.04(3); NEB. REV. STAT. § 81-1848(3); OKLA. STAT. ANN. tit. 19, § 215.22(2); WASH. REV. CODE ANN. § 7.69.030(3).

80. WIS. STAT. ANN. § 950.04(4) and (5); NEB. REV. STAT. § 81-1848(4), (5); OKLA. STAT. ANN. tit. 19, § 215.33(3) and (4); WASH. REV. CODE ANN. § 7.69.030(4).

81. WIS. STAT. ANN. § 950.04(6); NEB. REV. STAT. § 81-1848(6); OKLA. STAT. ANN. tit. 19, § 215.33(5); WASH. REV. CODE ANN. § 7.69-030(5).

82. WIS. STAT. ANN. § 950.04(7); NEB. REV. STAT. § 81-1848(7); OKLA. STAT. ANN. tit. 19, § 215.33(6); WASH. REV. CODE ANN. § 7.69.030(6). Other states have treated this area in an isolated fashion. *See, e.g.*, KANS. STAT. ANN. § 60.472 (Supp. 1981), which allows photographs of property alleged to have been wrongfully taken to be considered competent evidence equivalent to the property itself, so that the property may be returned to the owner rather than held awaiting some future and uncertain trial date. Photographs require less

intercession services to ensure the cooperation of employers and the minimum loss of pay.⁸³ Washington gives victims the right of access to immediate medical assistance, with no unreasonable delay by a law enforcement agency.⁸⁴ In all four states enumerating victims' and witnesses' rights, these rights and services are extended, where possible, to the families of homicide victims.⁸⁵ Wisconsin and Nebraska give victims and witnesses the right to "a speedy disposition of the case in which they are involved . . . to minimize the length of time they must endure the stress of their responsibilities."⁸⁶ No other states explicitly confront the issue of stress of victims and witnesses.

These bills of rights seek not only to provide specific services, but to reinforce within the criminal justice system human respect for the victims and witnesses of crime. As a policy, this will achieve the stated aim of improving the treatment of victims and witnesses after the crime has been committed, while simultaneously improving the effectiveness of the criminal justice system.

ELEMENTS OF A COMPREHENSIVE SOLUTION

Victims and witnesses must have certain rights in order to preserve the integrity of the criminal justice system. Existing state legislation is inadequate to deal with the problems victims and witnesses face, largely because of its piecemeal nature. The victims' bill of rights approach previously discussed represents strong progress towards the goal of a comprehensive statutory resolution, but nonetheless is insufficient. The elements of a comprehensive statute,⁸⁷ several of which have been previously discussed, are:

- (1) Victims' Bill of Rights;
- (2) notice to victims and witnesses of defendants' pretrial release, conditions set, and possibility of revocation;
- (3) notice to victims and witnesses of final disposition of case;
- (4) provisions for assessment of victim impact and opportunities for statements by victims; and
- (5) provisions prohibiting intimidation and retaliation.

storage space than the property itself, VICTIM/WITNESS LEGISLATION, *supra* note 3, at 37, and may eventually be needed as part of the trial record. Obviously, there will be some types of property whose identifying or valuable characteristics cannot be adequately photographed which should be retained in custody. There will also be types of property whose expeditious return seems of relatively little importance, but where a simple procedure can alleviate any of a victim's inconvenience and natural anxieties, it is certainly worth the minimal effort and cost involved.

83. WIS. STAT. ANN. § 950.04(8); NEB. REV. STAT. § 81-1848(8); OKLA. STAT. ANN. tit. 19, § 215.33(7); WASH. REV. CODE ANN. 67.69.030(7).

84. WASH. REV. CODE ANN. § 7.69.030(8).

85. WIS. STAT. ANN. § 950.04(10); NEB. REV. STAT. § 81-1848(10); OKLA. STAT. ANN. tit. 19, § 215.33(8); WASH. REV. CODE ANN. § 7.69.030(9).

86. WIS. STAT. ANN. § 950.04(9); NEB. REV. STAT. § 81-1848(9).

87. The Model Rights of Victims & Witnesses of Crime Act is appended, *infra* p. 408

CONCLUSION

Increased concern in recent years has led legislators and local prosecutors to consider more closely what can be done to solve the problem of the "forgotten victim." Legislative enactments and local projects have attempted to formulate efficient and adequate resolutions of previously unrecognized issues. Because the particular problems a victim or witness faces may have several dimensions, comprehensive approaches must be developed, integrating policy decisions with legislative action. The goal of improved criminal administration necessitates ever closer attention to victims and witnesses as persons whose involvement with crime is much larger than providing evidence and information.

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APPENDIX

MODEL RIGHTS OF VICTIMS AND WITNESSES OF CRIME ACT

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- Section 6. Assessment of Victim Impact.
- Section 7. Intimidation.
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Section 1. *Legislative Intent*

This Legislature recognizes that victims and witnesses of crime have an essential role in the administration of justice, as well as a personal concern in the outcome of a case, and that the victims and witnesses may easily be victimized again by the structure of the criminal justice system and the inequities of its administration. It is therefore the intent of the Legislature to ensure the enforcement of victims' and witnesses' basic rights and to ensure that all victims and witnesses are treated with human dignity, respect, courtesy and sensitivity, through the enactment of this statute and the encouragement of local policies in its furtherance.

Section 2. *Bill of Rights*

Victims and witnesses of crime have the following rights, to be enforced by all law enforcement and prosecutorial agencies:

- (a) To be informed by local law enforcement agencies and the district attorney of the final disposition of the case within 15 days of its becoming final; the victim and all material witnesses shall be notified of the defendant's release from custody pretrial, following trial, or within 5 years of conviction and imprisonment.
- (b) To be notified of court scheduling changes when the victims, or witnesses, presence has been subpoenaed or requested by a law enforcement officer or district attorney; the notification structure and method is left to local determination.
- (c) To be informed what level of protection from harm and threats of harm arising out of cooperation with law enforcement and prosecu-

tion efforts is actually available, and to receive such protection when the need is apparent or may be presumed from the circumstances of the case.

(d) To be informed of any social services available as a result of being a victim or witness of crime, and any compensation or restitution available, including application procedures.

(e) To be informed of any witness fees to which the person may be entitled, including application procedures.

(f) To be provided, whenever possible, with a secure waiting area in the courthouse, away from defendants and friends and families of defendants.

(g) To the speedy return of personal property taken as evidence by law enforcement agencies. When property is needed as evidence for trial, photographs will be taken by a law enforcement agent, acknowledged on back in writing by owner and impounding officer as photographs of the property involved in the case, and stored securely for eventual use. In the case of weapons, currency, and contraband, the highest local law enforcement official will determine procedures to be followed.

(h) To be provided employer intercession services by law enforcement or prosecutorial agencies to assure employers' cooperation to minimize victims' and witnesses' loss of pay and other benefits as a result of cooperation with the criminal justice system, particularly court appearances.

(i) To access to immediate medical assistance, unhindered by a law enforcement agent or questioning about the crime.

(j) To a speedy disposition of the case with which they are involved to minimize the time they must endure the stress of their responsibilities and position as a victim or witness of crime.

(k) To receive explanations orally or in prepared pamphlets, of the criminal charges and procedures involved, and the responsibilities and rights, including rights under this statute, which they have as a result of being a victim or witness.

(l) Family members of all homicide victims, whether or not they are witnesses to the crime or will be witnesses in any criminal proceeding, will be afforded all the rights under subsections (a) to (d) and (f) to (k).

Section 3. *Notice to Victims and Witnesses of Defendant's Pretrial Release, Conditions Set, and Court's Right of Revocation*

(a) Any pretrial release of a defendant or accused, whether on bail or other form of recognizance, shall include the condition that the defendant or accused neither do nor cause to be done on his or her behalf, conduct prohibited under subsections 1 and 8 of this Code punishing

intimidation and retaliation, or any other provisions of this Code punishing bribery or obstruction of justice.

(b) Clear and convincing proof of conduct in violation of this order shall be grounds for revocation of pretrial release. A second pretrial release will not be granted the same defendant in the same criminal proceeding.

At the time of release, the defendant shall be notified in writing of this condition and that its violation is grounds for revocation of pretrial release.

(c) All victims and witnesses known to law enforcement officers or the district attorney at the time of pretrial release will be immediately notified of the release, including the condition against intimidation, retaliation, bribery, and obstruction of justice, and that violation of this condition is grounds for revocation of the defendant's pretrial release. This condition, and any others set by the court in its discretion, will be explained, orally or by a prepared writing, to the victim or witnesses, who shall be given a name and number of the official to whom to report any conduct possibly in violation of this condition.

(d) If the victim or witness is no longer present and cannot be reached by telephone, written notice shall be sent; if an incorrect or fictitious address or phone number has been given, notification will not be required.

The requirement of notification shall be extended to any victims or material witnesses whose existence becomes known to law enforcement officers or the district attorney after pretrial release but before trial.

Section 4. *Notice of Final Disposition of Case*

(a) All victims and witnesses of a crime, including all those who do not testify at an official court proceeding, shall be notified by telephone or in writing of the final disposition of the case in which they are involved. This notice will include an explanation of the disposition in ordinary lay terms, and a statement of the probable result of the disposition for the defendant.

(b) If the final disposition involves the defendant's release, the victims and witnesses shall be notified immediately. In all other cases, notice shall be given within 15 days.

(c) If the victim and witness is not present at the proceeding and cannot be reached by telephone, written notice shall be sent; if an incorrect or fictitious address or phone number has been given, notification will not be required.

The requirement of notification shall be extended to any victims or material witnesses whose existence becomes known to law enforcement officers or the district attorney after pretrial release but before trial.

Section 5. Use in Plea Negotiation of Victim's Personal Statement

(a) A prosecutor making a recommendation to a court on a felony charge must:

(1) Inform the victim that discussions are being conducted concerning a charge recommendation;

(2) Inform the victim of the contents of the recommendation before it is filed, explaining its probable result for the defendant; and

(3) Notify the victim of the right to make a written statement concerning the charge, to be given to the court by the prosecutor before the recommendation is considered; where the victim makes no statement, the prosecutor must certify that this opportunity was offered.

(b) Rights of victims under this section shall extend also to the spouse, parent, or next of kin of a homicide victim or of a victim under age 18.

(c) A court may consider a recommendation on a felony charge only if the prosecutor has complied with section (a).

(d) The court shall be under no obligation to accept or incorporate the recommendations of the victim. [*This section will be subject to variation in accordance with the individual state's existing legislation and practice of plea negotiations.*]

Section 6. Assessment of Victim Impact

(a) Whenever a presentence report is required, by this Code or by court request, the investigator or person responsible for preparing the report shall contact the victims, and in a case involving actual or threatened physical harm, any witnesses present when the crime was committed, and include in the presentence report an assessment of the total impact of the crime on the victim, the victim's immediate family, and the community. The report shall identify economic losses, physical injuries, and any changes in the victim's personal welfare or familial or work relationships as a result of the offense including any psychological impact experienced by the victim or the victim's family. Any additional information related to the impact of the offense of which the investigator learns shall be included. The court may specifically require investigation into a particular area, and may request additional investigation after reviewing the report.

(b) The investigator shall offer the victim the opportunity to make a brief written recommendation on sentencing or rehabilitation, to be included in the presentence report, after being informed of the statutory penalties for the crime and any other available sentencing options. The court shall be under no obligation to accept or incorporate the recommendations of the victim.

Section 7. *Intimidation*

(a) Every person, whether or not the defendant in a criminal action, who knowingly prevents or dissuades or attempts to prevent or dissuade any victim or witness of a crime from:

- (1) reporting the occurrence of a crime, or
- (2) giving to law enforcement or prosecutorial agencies his or her full information about the crime, or
- (3) attending or testifying at any official proceeding relating to the crime, shall be guilty of a misdemeanor, or if physical force is used or threatened, of a felony.

(b) Conduct punishable under this subsection includes, but is not limited to, verbal or physical threats made to the victim or witness concerning the victim, witness, or any other person, or the property of the victim, witness, or other person.

(c) Conduct punishable as a separate crime under other provisions of this Code is not thereby precluded from punishment under this subsection.

(d) Sentencing under this subsection of one who is also convicted on the underlying charge to which this subsection relates shall be consecutive with the sentence received in the underlying criminal action.

Section 8. *Retaliation*

(a) Every person, whether or not the defendant in a criminal action, who knowingly harms or threatens harm to one who has been the victim or witness of a crime, or to the family or property of a victim or witness, in retaliation for the victim's or witness's cooperation with law enforcement or prosecutorial agencies, or participation in an official criminal investigation or proceeding, shall be guilty of a felony.

(b) Conduct punishable as a separate crime under other provisions of this Code is not thereby precluded from punishment under this subsection.

(c) Sentencing under this subsection of one who is also convicted on the underlying charge to which this subsection relates shall be consecutive with the sentence received in the underlying criminal action. *[The grading of the offenses in Sections 7 and 8 as felonies or misdemeanors will be subject to the individual state's grading scheme; this Act was drafted in contemplation of a minimum sentence of 6 months to 3 years, depending on the degree of force used, the harm caused to persons or property, and the resulting interference with the administration of criminal justice.]*

Section 9. *General Provisions*

(a) Subsections 3 through 6 create no additional rights in the defendant; failure of law enforcement or prosecutorial agencies to comply

with subsection 3, 4, 5, or 6 shall not be grounds for post-conviction relief.

(b) Subsection 7 and 8 shall not be construed as limiting in any way the inherent power of the court to protect itself and the criminal justice process from interference.